IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 139 22

MAX LEVINSON,

Petitioner,

vs.

SPECTOR MOTOR SERVICE, A CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

BRIEF FOR RESPONDENT.

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I. The record shows that the petitioner devoted the major portion of his work week to performing duties which substantially and directly affected the safety of operation of motor vehicles used in Interstate Commerce. Pursuant to the provisions of Section 204 of the Motor Carriers Act of 1935 the Interstate Commerce Commission has exclusive jurisdiction to establish qualifications and his maximum hours of service. He is, accordingly, specifically exempted from the provisions of the Fair Labor Standards Act.

II. The judgment of the Supreme Court of Illinois is based upon the finding of ultimate fact, disclosed by the record, that by reason of the nature and scope of the work performed by the petitioner, his duties substantially affected the safety of operation of respondent's motor vehicles in Interstate Commerce. To that determinative fact, the Supreme Court of Illinois applied the holdings of the Interstate Commerce Commission, as confirmed by this court, to the effect that such employees are exempt from the provisions of the Fair Labor Standards Act.

III. No question of due process of law is involved.

IV. No important question of law is involved.

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BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the Appellate Court of Illinois is reported in 323 Ill. App. 505. The opinion of the Supreme Court of Illinois is reported in 389 Ill. 466. (Advance sheets, 389 Ill. No. 6.)

Jurisdiction.

Petitioner invoked the jurisdiction of this Court under Rule 38, Paragraph 5(2) of this Court, and Section 1, Amendment XIV of the United States Constitution.

Petitioner has expanded his "Statement With Respect to Jurisdiction" into an argumentative attack on the judgment of the Appellate and Supreme Courts of Illinois. We reserve our comment for our argument.

The Question Presented.

Did the services rendered by the petitioner, as the same appear from the record in this case, substantially affect the safety of operation of the respondent's motor vehicles used by it as a common carrier of freight in interstate commerce? Stated otherwise: Did said services place petitioner within the classification of a "loader", as determined by the Interstate Commerce Commission in *ex parte* M. C. 2, 28 M. C. C. 125, and make him subject to the Commission's exclusive power to establish qualifications and maximum hours applicable to employees of his class?

The Statutes Involved.

The pertinent provisions of the Motor Carrier Act of 1935, and of the Fair Labor Standards Act of 1938, and of the Illinois Civil Practice Act are set forth in the appendix, *infra*, at pages 31 and 32.

Statement of the Case.

Petitioner's counsel has failed to make a fair statement of the case. After reciting the pleadings he sets forth, at pages 9 and 10 of his brief, such selected portions of petitioner's own testimony as he considers sufficient to support his contention, but omits substantial portions of petitioner's own admissions made on cross-examination, and totally fails to mention or refer to the testimony of any of the witnesses who appeared on behalf of the respondent.

A similar lack of fairness and candor was exhibited by the petitioner in his appeal to the Supreme Court of Illinois, where he failed to include pertinent testimony in his abstract of record, and it was necessary for the respondent to file an additional abstract in said Court. (R. 31-40.)

Accordingly, we submit the following synopsis as the respondent's statement of the case.

During the entire period of petitioner's employment, which is here involved, the petitioner acted as a dock foreman or superintendent of loaders and dockmen. The major portion of his time was spent in loading and unloading, and in supervising men working under him in loading and unloading trucks for the transportation of freight in interstate commerce. That was his principal duty, and that such work directly affected the safety of operations of respondent's trucks appears from the testimony of all of the witnesses, including that of the petitioner.

Petitioner, on cross-examination, testified that he worked in both the outbound and the inbound division; quite a few men, three or four gangs, each consisting of three or sometimes four men, were directly responsible to him. They all loaded and unloaded freight in the entire operation. (R. 13.) The men that he was in charge of did nothing else but handle, load, unload, check and stack freight. He saw that things should go right and if any man did something wrong he tried his best to correct him and showed him the proper and easier way to do it. (R. 14.) That as a foreman, it was his duty to supervise the men; that he was head man on the dock; that he had charge of that entire place (R. 35), that about thirty or forty per cent of his time was taken in loading, and the other sixty per cent was in supervising the men, checking, etc.; that he was in direct charge of all the men who loaded and unloaded vehicles during the hours which he spent at the terminal or dock. (R. 36.)

The respondent's several witnesses testified that the petitioner would instruct the men as to the proper procedure for loading, where to put cargo in the truck which would result in the equipment moving safely over the road; that there was loading of both inbound and outbound equipment

during the day (R. 37); that practically all day, as well as during the night, there was as much inbound freight as there was outbound (R. 38); that petitioner supervised the loading and the unloading, saw to it that the load was properly stacked and packed so that it would ride safely; that as a checker who is the head of the gang loading trucks, his main job is to see that the load is properly stacked and he is responsible for seeing that the load rides safely on the highway. (R. 38, 39.)

The trial court made a finding of facts and law in favor of the petitioner, including a finding that his work, or the major portion thereof, did not affect the safety of defendant's operations within the meaning of Section 13(b) of the Fair Labor Standards Act of 1938, and that petitioner was not exempt by virtue of said section. (R. 48.)

On appeal by the respondent to the Appellate Court of Illinois, that Court held that "there was no question that the loaders in his gang were exempted from Section 7 of the Fair Labor Standards Act because of the manner in which their work affected the safety of the operation of defendant's motor vehicles and that the duties of plaintiff, who planned and directed the loading, affected that safety." (R. 49.)

The Appellate Court reversed and remanded the cause with directions to enter judgment for costs in favor of the respondent (defendant) and against the petitioner (plaintiff). (R. 27.)

Decision of the Supreme Court of Illinois.

On appeal by the petitioner to the Supreme Court of Illinois, that Court, after analyzing the cases interpreting and construing the Motor Carrier Act as to employees coming thereunder by reason of their employment affecting safety of operations, stated that it was "of the opinion that the true determinant is not whether an employee performs any duties which substantially affect the safety of operations, but whether the duties affecting the safety are substantial." (R. 50-51.)

The basis of the affirmance by the Supreme Court of Illinois of the judgment of the Appellate Court is tersely stated thus: "We think the question of fact to be properly determined in this case is whether or not a substantial part of plaintiff's work affects the safety of operation of motor vehicles, and that this question of fact controls the case." (R. 51.)

The Court concluded its opinion by saying:

> "The Appellate Court may be in error in the reasons given for its judgment, but, under the facts as found by the court, the employee came within the same exemption as loaders, dockmen and helpers.
>
> For the reason aforesaid, the judgment of the Appellate Court is affirmed." (R. 52.)

SUMMARY OF ARGUMENT.

I. The record shows that the petitioner devoted the major portion of his work week to performing duties which substantially and directly affected the safety of operation of motor vehicles used in Interstate Commerce. Pursuant to the provisions of Section 204 of the Motor Carriers Act of 1935 the Interstate Commerce Commission has exclusive jurisdiction to establish qualifications and his maximum hours of service. He is, accordingly, specifically exempted from the provisions of the Fair Labor Standards Act.

II. The judgment of the Supreme Court of Illinois is based upon the finding of ultimate fact, disclosed by the record, that by reason of the nature and scope of the work performed by the petitioner, his duties substantially affected the safety of operation of respondent's motor vehicles in Interstate Commerce. To that determinative fact, the Supreme Court of Illinois applied the holdings of the Interstate Commerce Commission, as confirmed by this court, to the effect that such employees are exempt from the provisions of the Fair Labor Standards Act.

III. No question of due process of law is involved.

IV. No important question of law is involved.

ARGUMENT.

I.

The Record Shows That the Petitioner Devoted the Major Portion of His Work Week to Performing Duties Which Substantially and Directly Affected the Safety of Operation of Motor Vehicles Used in Interstate Commerce. Pursuant to the Provisions of Section 204 of the Motor Carriers Act of 1935 the Interstate Commerce Commission Has Exclusive Jurisdiction to Establish Qualifications and His Maximum Hours of Service. He Is, Accordingly, Specifically Exempted From the Provisions of the Fair Labor Standards Act.

The petitioner based his suit on the provisions of the Fair Labor Standards Act of 1938, particularly Section 207 thereof. (Appendix 31.) Section 213 of said Act, however, provides that employees with reference to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service shall be exempt from the provisions thereof. (Appendix 31.)

The Interstate Commerce Commission has exclusive power to regulate the maximum hours of service of certain employees by virtue of the provisions of the Motor Carrier Act of 1935. (Appendix 31.)

This Court, interpreting the respective provisions of the Motor Carrier Act of 1935 and of the Fair Labor Standards Act of 1938, in *U. S.* v. *American Trucking Associations*, 310 U. S. 534, at page 553 said:

> "Our conclusion, in view of the circumstances set out in this opinion, is that the meaning of employees in Section 204 (a) (1) and (2) *is limited to those employees whose activities affect that safety of operation.*" (Emphasis supplied.)

Shortly after the above decision, the Interstate Commerce Commission rendered an opinion and report in volume 28, Motor Carrier Cases, reading in parts as follows, at page 126:

> "By the Commission:
>
> The sole question presented for our decision at this time is the determination of *which employees* of common or contract carriers and private carriers of property by motor vehicle, if any, *other than drivers, perform duties which affect the safety of operation and are therefore subject to the authority conferred on us* by section 204 (a) (1), (2), and (3) of part II (formerly cited as the Motor Carrier Act, 1935) of the Interstate Commerce Act to prescribe qualifications and maximum hours of service. *The importance of this question is emphasized by the fact that section* 13 (b) (1) *of the Fair Labor Standards Act exempts from the overtime provisions of section* 7 *thereof any employee with respect to whom we have power to establish qualifications and maximum hours of service* pursuant to the provisions of said section 204. Before the Wage and Hour Division of the Department of Labor, which administers the provisions of the Fair Labor Standards Act, or the common, contract, and private carriers can well determine which employees are subject to the provisions of section 7 of that act, *they must know the extent of our jurisdiction.*" (Emphasis supplied.)

At page 128, the Commission quoted from its report in *re Jurisdiction Over Employees of Motor Carriers*, 13 M. C. C. 481 at page 488, as follows:

> "For the reasons stated we conclude that our power under section 204 (a) (1) and (2) is limited to prescribing qualifications and maximum hours of service for those employees of common and contract carriers whose activities affect the safety of operation of motor vehicles engaged in transporting passengers and property in interstate and foreign commerce, and for the purpose of promoting such safety of operation." (Emphasis supplied.)

The Commission, continuing its report in 28 M. C. C., further stated at page 131:

> "There are other decisions of similar import, and, as a result of our study of them and of the Supreme Court's decision in *United States* v. *American Trucking Assns., Inc., supra,* we have concluded that *we should not assert jurisdiction as to employees who spend an unsubstantial part of their time* in performing duties which affect the safety of operation of motor vehicles. *We therefore* conclude that under said section 204 (a) we have *power to establish qualifications and maximum hours* of service with respect only to *employees who devote a substantial part of their time to activities* which *directly affect safety of operation.* Our task is thus narrowed to determining which employees of common and contract carriers and of private carriers of property by motor vehicle, engaged in interstate or foreign commerce, fall within that category." (Emphasis supplied.)

The Commission then reviewed the evidence presented to it by all interested parties, and in commenting thereon said at page 132:

> "The record in this proceeding discloses that the employees engaged in *preparing the motor vehicles for operation on the highways* and in the actual operation thereof fall into five principal classes, as follows: (1) Mechanics and other garage workers; (2) *loaders;* (3) dispatchers; (4) drivers; and (5) helpers." (Emphasis supplied.)

The Commission, with particular reference to loaders, said at page 133:

> "The large carriers, however, and particularly those who have important operations from terminal to terminal, employ *men variously called loaders, dockmen, or helpers,* and *hereinafter called loaders,* whose sole duties are to *load and unload* motor vehicles and transfer freight between motor vehicles and between the vehicles and the warehouse.

The evidence makes it entirely clear that *a motor vehicle must be properly loaded to be safely operated on the highways* of the country. If more weight is placed on one side of the vehicle than on the other, there is a tendency to tip when rounding curves. If more weight is placed in the rear of the vehicle, the tendency is to raise the front wheels and make safe operation difficult. Further, it is necessary that the load be distributed properly over the axles of the motor vehicle. • • •

Evidence concerning the necessity for proper loading was submitted not only by the carriers but by representatives of the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, the union to which organized loaders belong. *There was no conflicting evidence on this point. We conclude that loaders devote a large part of their time to activities which directly affect the safety of operation of motor vehicles operated in interstate or foreign commerce, and hence that we have power to establish qualifications and maximum hours of service for such employees under said section* 204 (a)."

The Commission further in this report under the heading of "Findings of Facts" said at page 139:

"2. That *loaders, as* above *defined,* employed by common and contract carriers and private carriers of property by motor vehicle subject to part II of the Interstate Commerce Act *devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce.*"

The Commission further in this report under the heading of "Conclusions of Law" said at page 139:

"2. That *our jurisdiction* to prescribe qualifications and maximum hours of service for employees of common and contract carriers and private carriers of property by motor vehicle *is limited to those employees who devote a substantial part of their time to activities*

which directly affect the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce.

3. That *we have power*, under section 204 (a) of said part II, *to establish* qualifications and *maximum hours of service* for the classes of employees covered by findings of fact numbered 1, 2, and 3 above, and that we have no such power over any other classes of employees, except drivers." (Emphasis supplied.)

The mere fact that the Interstate Commerce Commission has not exercised its jurisdiction with reference to employees over whom it has *power* to make regulations is immaterial. That this power, whether exercised or not, has existed in the Interstate Commerce Commission since the enactment of the Motor Carrier Act of 1935 is now firmly established. *Southland Company* v. *Bailey*, 319 U. S. 44. That this principle was generally recognized is evidenced by the following United States District Court decisions:

In *Bechtel* v. *Stillwater Milling Co.*, 33 Fed. Supp. 1010, the court made use of the following language at page 1014:

"(3) This court, therefore, is of the opinion that the *power* granted to the Interstate Commerce Commission *is an exclusive power* and *by the exemption in the Fair Labor Standards Act, Congress meant to recognize the power that had been granted to the Interstate Commerce Commission.*" (Emphasis supplied.)

In *Robbins* v. *Zabarsky*, 44 Fed. Supp., page 867, the court said at page 870:

"If the Interstate Commerce Commission has the *power* to fix maximum hours for a given employee, the Fair Labor Standards Act is not applicable to him, *regardless of whether or not the Commission has exercised the power.* That is the plain language of Section 13 (b) (1) and the construction by the courts

has followed it: *West* v. *Smoky Mountains Stages, Inc., supra; Magann* v. *Long's Baggage Transfer Co., Inc.*, D. C., 39 F. Supp. 742." (Emphasis supplied.)

In *Faulkner* v. *Little Rock Furniture Mfg. Co.*, 32 Fed. Supp., page 590, the court expressed itself as follows, at page 592:

> "I therefore conclude • • •
>
> • • • That the Interstate Commerce Commission has *power* to fix maximum hours of service 'if need is found', and if they have not done so *no power is reserved or delegated to the Administrator of the Fair Labor Standards division of the Department of Labor to do so*, and the employees acquire no rights under the Fair Labor Standards Act of 1938.
>
> Therefore the plaintiff cannot recover, and this action under the maximum hours section of the Fair Labor Standards Act of 1938 must be and is dismissed." (Emphasis supplied.)

In a parallel case with facts almost identical with the one under consideration here, Judge Holly of the District Court of the United States, for the Northern District of Illinois, in *Tinerella, et al.* v. *Des Moines Transp. Co., Inc.*, 41 Fed. Supp. 798, at page 799, said:

> "Plaintiff's employment (except that of one plaintiff, Ray Chase) consisted of *loading and unloading* the defendant's truck of cargo merchandise, freight and commodities. Since the decision of the Supreme Court in American Trucking Associations, Inc., the Interstate Commerce Commission, after a hearing participated in by the employers, labor unions and associations, entered a formal order finding that *loaders and helpers perform duties which materially affect the safety of operation of motor vehicles in interstate commerce, devote a substantial part of their time to activities which directly affect the safety of operation of motor vehicles operated in interstate commerce* and

that the Commission has *power* to establish qualifications and maximum hours of service of such employees."

Accordingly Judge Holly held, at page 800:

"(4) In my opinion plaintiffs herein do not come under the Fair Labor Standards Act so far as their hours of labor are concerned." (Emphasis supplied.)

Whether the petitioner himself did the physical work of loading or was a foreman of loaders or a supervisor of loaders, is of no significance. In *Robbins* v. *Zabarsky, et al.*, 44 Fed. Supp. 867, the court said, at page 869:

"The complaint states he was employed as 'a mechanic to repair and service the trucks and equipment of the defendants' and 'as a *foreman to superintend and direct* other mechanics who repaired and serviced the trucks and equipment of the defendants.' I believe that in such capacity it is clear that his duties would be such that *the safety of the defendants' operations would be affected by* his manner of performing them. Such essentials as adequate brakes and proper electrical equipment would be his responsibility. *Carelessness on his part, either in performance or in supervising performance of service* and repair jobs, *might result in the creation of great hazards* in the operation of the vehicles." (Emphasis supplied.)

The petitioner cites to support his position the case of *Overnight Motor Transportation Company* v. *Missel*, 316 U. S. page 572. The facts in that case are diametrically opposed to the facts in the case at bar. The court in rendering its decision in the above case said:

"Respondent, Missel, was an employee of the petitioner, Overnight Motor Transportation Company, a corporation engaged in interstate motor transportation as a common carrier. HE ACTED AS RATE CLERK AND PERFORMED OTHER INCIDENTAL DUTIES, NONE OF WHICH WERE CONNECTED WITH SAFETY OF OPERATION." (Emphasis supplied.)

The petitioner cites the case of *Anuchik, et al.* v. *Trans-American Freight Lines, Inc.*, C. C. H. Labor Law Service 61,245. A reading of this case leads us to believe that a thorough analysis thereof was not made by the petitioner. That case was brought by the following workers: tarpaulin worker, porter, pickup driver, loader, stockroom boy, and night watchman. The court found that the defendant in that case *as to all those workers except the pickup driver,* was actually *engaged in the business of manufacturing* and remodeling trucks and tractors, having gone so far as to apply to the State of Michigan for a *manufacturer's* license plates, and therefore, would not allow the defendant to claim that it was in the manufacturing business at one time and then claim for other purposes it was not. The court said:

> "This court acknowledges that this is a close question but reviewing all the testimony it is our opinion that here again the work done can be divided into what can be regarded as 'safety of operation' and what not. To begin with the evidence shows that whenever a Gotfredson tractor was rebuilt by these plaintiffs defendant got a *manufacturer's* license plate for the new job to take it to its points of destination. Under Section 4639 C. L. Michigan 1929, this has been interpreted to mean that the motor vehicles bearing those plates were *'just manufactured.'* See *People* v. *Wirth*, 218 Mich. 493. Defendant also used these *'manufacturer's plates'* in connection with pick-up trucks and Ford tractors. It will be therefore apparent that *defendant itself looked upon these as manufactured goods* and under *U. S.* v. *Armature Exchange, Inc., supra,* a case interpreting a federal statute, *defendant was certainly 'manufacturing.'* Defendant should not be permitted to blow hot and cold, taking advantage of one law to be *in the manufacturing business* and another one not to be. Here the question of manufacturing or 'building' is more determinative than in Case No. 2830." (Emphasis supplied.)

The court *made no determination* as to the pick-up driver, *the only employee who was directly connected with safety of operation, because* no testimony was presented with reference to him, and the court left its decision open as to him until the matter was either settled or evidence presented.

The petitioner made a studied attempt, by designating himself a "checker," to escape the all important fact that his major and most important duties concerned themselves with safety of operation.

The petitioner, to emphasize his point that he was a "checker", and therefore was included within provisions of Section 7 of the Fair Labor Standards Act of 1938, cited *McKeown* v. *Southern California Freight Forwarders, et al.*, 61521 C. C. H. Labor Law Service. The court found in that case as follows:

> "The principal work of the plaintiff was that of a checker employed by the defendant. Goods which were *unloaded* on the platform were checked by the plaintiff and at times, *but infrequently*, he assisted in placing the goods in a truck which transported them to their destination, or in a bin." (Emphasis supplied.)

The findings of fact in the above case are also diametrically opposed to the undisputed facts in the case at bar.

The record clearly discloses that the petitioner was either *a loader, foreman, or supervisor of loaders during the entire period for which he claims.* Regardless of the title or name given to his duties for the period involved, *a substantial part* of his duties, and a *substantial and major part* of the actual work done by him and by the employees immediately under his supervision and control, *directly affected the safety of operation.*

An examination of the petitioner's own testimony makes that conclusion inescapable. His testimony is as follows:

"During the day I was in charge of every man on

the dock, except the men who were superior to me. The only man superior to me on the dock was Jack Levinson." (R. 36.) * * * "As foreman, I said my duty was to supervise the men." (R. 35.) * * * *"These men that I was in charge of did nothing else but handle, load, unload, check and stack freight."* (R. 14.) * * * "I was in direct charge of all men who *loaded and unloaded vehicles during the hours which I spent at the terminal or dock."* (R. 36.) * * * "I was the head man on the dock. If I saw a man coming in who was drunk, it was part of my duty not to let him work that day." (R. 13.) * * * "I watched all that. While I was there, trucks, either Spector trucks, lease operators or interline carriers were *loaded to go over the road."* (R. 13.) To a certain extent, a checker watches the loading of trucks and the distribution of the weight in the truck. * * * "The *checker* is at the head of a gang *loading* a truck." * * * I supervised these checkers and also acted as checker." (R. 35.)

The uncontradicted testimony of the respondent's witnesses clearly shows that not only a *substantial part,* but a major part of the plaintiff's time was spent in work *directly affecting safety of operations.* We quote as follows from the testimony of the respondent's witness, TED JARVIS:

"He worked nights when I worked nights, and I worked days when he worked days also." (R. 38.) "During the period he acted as foreman, he would give the gang the bills, tell them to load certain trailers or trucks, whichever the bills were marked for, after the city dispatcher had routed them in the different sections of the city. *He also told them with reference to loading of city and out of town trucks. He supervised the loading and unloading, seeing to it that the load was properly stacked and packed so that it would ride safely."* (R. 20, 21; 38, 39.)

JACK LEVINSON, one of the witnesses for the respondent, testified as follows:

> • • • "He would instruct the men the proper procedure for loading, where to put it in the truck which would result in *the equipment moving safely over the road* if it were over the road equipment, or at the speed which a local delivery driver might affect his actual deliveries in the city." (R. 37.)

SAM FISHMAN, another witness for the respondent, testified as follows:

> "Beginning October, 1940, his position was changed, he got to be boss. He was directing the work on the dock for a couple of months. I do not know exactly how long. *During the whole day he was telling us to load and unload* whatever was supposed to be done. That is all he told us. *He wanted us to load the trailers his way,* and break them down his way." (R. 22.)

WILLIAM A. PROKOP, another witness for the respondent, testified:

> "• • • I remained on his gang until he quit. I can't tell off-hand when that was. He was working directly with me on the gang, he was the boss. He was practically the boss of the whole dock at that time, dock foreman." (R. 24.) • • • "*A checker's duty is to see that the loads are properly loaded and checked out, and the goods taken in or given out, according to the bill of lading, and the loads properly loaded and unloaded.*" (R. 24.)

The handiwork of petitioner's counsel is easily discerned in the repeated attempts of the petitioner carefully and insistently to evade all references to *those duties with which he was charged as a loader or a supervisor of loaders.*

The length to which the petitioner went to avoid the fact that his duties concerned themselves principally, primarily and substantially with safety of operations can be seen by his omission of pertinent parts of the testimony in the Abstract of the Record filed by him in the Illinois Supreme Court. It became necessary for the respondent to file an additional Abstract of the Record.

We respectfully call the court's attention to those omissions, which are succinctly abstracted at pages 35 to 40 of the transcript of Record herein.

At page 20 of petitioner's brief reference is made to the Labor Administrator's interpretative bulletin No. 9 which suggests "the greater part of his time during any work week on non-exempt activities" as the gauge by which to determine the inclusion or exemption of any particular employee from the provisions of the Fair Labor Standards Act.

It is to be noted that the interpretative bulletins issued by the Labor Administrator are not issued as regulations under statutory authority of the Congress. *Overnight Motor Co.* v. *Missel*, 316 U. S. 572 at 581. While the Courts generally have stated that bulletins of the Administrator are persuasive as expressions of those experienced in the administration of the act, such references by the Court have been to situations wherein the jurisdiction of the Labor Administrator is clear and definite. In view of the fact, however, that it has been determined beyond cavil or dispute that the Interstate Commerce Commission alone has the *power* to determine qualifications and maximum hours of service for employees engaged as loaders of motor vehicles used in interstate commerce, and that non-action by the Interstate Commerce Commission to define the words "a substantial part of their time" does not enlarge the jurisdiction of the Labor Administrator.

Whether or not the duties of a given employee *substantially* affect the safety of operation of motor vehicles engaged in interstate commerce is a question of fact, and in each instance, must be left to judicial determination. Were it otherwise, the Labor Administrator would be in a position to promulgate bulletins defining as "substantial", any percentage which he might wish, even to such an extent as to nullify the findings of the Interstate Commerce Commission. The ordinary and well understood meaning of the word "substantial" is "important" or "material".

We again emphasize the finding of fact and the conclusion of law made by the Interstate Commerce Commission in its report, 28 M. C. C. page 139, wherein the finding is made that loaders devote a large part of their time to activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce, and their conclusion of law that the Commission's jurisdiction is limited to that class of employees.

In *Crean* v. *Moran Transportation Co.*, 57 Fed. Supp. 212, it was held that:

> "By substantial is not meant a majority of the time."

Historically, it is a fact that prior to the issuance of said bulletin No. 9 the measure adopted by the Labor Administrator required an employee to spend not less than eighty per cent (80%) of his time in any work week in the performance of services within the categories established by the Interstate Commerce Commission as affecting safety of operations. In this connection, the Circuit Court of Appeals for the Fifth Circuit, in the case of *Fleming* v. *A. H. Belo Corporation*, 121 Fed. (2) 207, in a suit instituted by the administrator of the Wage and Hour Division to enjoin the defendant from violating the Fair Labor Standards Act, aptly said, at pages 212-213:

> "The issue presented here by the claim of the ap-

pellant that though the statute does not say so, it must be construed to give full effect to the purpose of placing him as administrator of the act in a tutelary position, the employer and employee in a state of tutelage to him, so that they no longer have a right to fix their wages by agreement, but must fix them according to the legalistic interpretative formulas of the administrator's general counsel, brings this into sharpest focus. * * * legislation is compromise. * * * Its meaning may not be sought by the courts in the vague penumbrae of the wishes and desires of its proponents or its opponents as these are expressed in debates. Particularly, may it not be sought in the purely legal interpretation by the administrator's legal staff, for if this were so, the administrator would find himself, not only in the powerful position he properly stands in, of administrator for the Congress of one of its laws, as plaintiff bringing suit in the name and power of the United States to enforce the law, but, by issuing a binding interpretation of it before he brings his suit, in the position of a judge in his own cause who has written his decision before hand."

In 316 U. S. 624, this Court, in affirming the decision in the *Belo* case, criticized the Administrator's "time-off plan" which is explained in Interpretative Bulletin No. 4 (p. 633), and declined to provide a rigid definition of "regular rate" when Congress has failed to provide one, stating: "And that which it was unwise for Congress to do, this Court should not do." It may be said with greater force that if the Interstate Commerce Commission, which has exclusive jurisdiction to determine qualifications and maximum hours for loaders, has refrained from providing a rigid definition of "substantial," such omission does not shift the power to, nor should it be exercised by, the Administrator.

It is elementary that the *nature of the services rendered by an employee* determines whether he is subject to or exempt from the provisions of the Fair Labor Standards Act of 1938.

A review of the testimony of the petitioner and respondent's witnesses clearly shows that, regardless of the other fluctuating duties which the petitioner claims to have performed, the preponderating weight of evidence is that *during at least eight to ten hours of each working day; during the period here involved, he worked at, or supervised the loading and unloading of trucks used in interstate commerce—duties which directly affected safety of operations.*

The decision of the Appellate Court not only conforms to the overwhelming preponderance of the evidence in this case, but is in harmony with the petitioner's own testimony, some of which we quoted and referred to in our argument above, which *shows clearly that practically his only duties by his own admission were those of a foreman in charge of men whose sole and only duty was to handle, load and unload and stack freight, which was carried on trucks in interstate commerce.*

II.

The Judgment of The Supreme Court of Illinois is Based Upon the Finding of Ultimate Fact, Disclosed by the Record, That by Reason of the Nature and Scope of the Work Performed by the Petitioner, His Duties Substantially Affected the Safety of Operation of Respondent's Motor Vehicles in Interstate Commerce. To That Determinative Fact, The Supreme Court of Illinois Applied the Holdings of the Interstate Commerce Commission, as Confirmed by This Court, to the Effect That Such Employees are Exempt From the Provisions of the Fair Labor Standards Act.

Petitioner predicates his argument upon the assumption that the Municipal Court's finding to the effect that peti-

tioner's work did not affect safety of operation is unassailable.

That assumption is entirely erroneous.

It is familiar law that judgments of *nisi prius* courts are subject to review both as to findings of fact and rulings of law, and that there is no sanctity in the judgment of a trial court in any cause which may be reviewed on appeal. Particularly, it is the law of the State of Illinois that the Appellate Court has power and authority to make a final determination of a case different from that of the trial court, where trial was had without a jury. *Chapter 110, Section 213, Smith-Hurd Illinois Statutes (Section 89 Illinois Civil Practice Act).* (Appendix 32.) And it is further the law of Illinois that findings of fact by the Appellate Court may not be reviewed by the Illinois Supreme Court in such a case at law. *Chapter 110, Section 216, Smith-Hurd Illinois Revised Statutes (Section 92(3)(b) of Illinois Civil Practice Act).* (Appendix 32.)

Ebbert v. *Metropolitan Life Insurance Co.*, 369 Ill. 306, affords a complete answer to the contention made by the petitioner that the Appellate Court invaded the province of the trial court in disregarding the specific findings of the trial court. After quoting Section 92(3)(b) of the Civil Practice Act, the Illinois Supreme Court at page 310 makes use of the following language:

> "It is appellant's contention that, since the evidence was conflicting, it was the province of the trial judge to weigh the evidence, and that, by invading that province and reversing the judgment, the Appellate Court committed an error of law. However, this contention can not be sustained in view of the contrary language of section 89 of the Civil Practice act (Ill. Rev. Stat. 1937, chap. 110, par. 213), which is a revision of section 120 of the Practice act of 1907.

* * * * *

(Page 311):

In *Economy Fuse and Manf. Co.* v. *Standard Electric Manf. Co.*, 359 Ill. 504, a similar question was presented. The cause had been tried before a judge of the municipal court of Chicago, a jury trial having been waived. The Appellate Court reversed this judgment, finding the facts to be different than found by the municipal court judge. In affirming the judgment of the Appellate Court we said: 'This was a question of fact as to which the finding of the Appellate Court is binding upon this court if there be any evidence in the record tending to support such finding.' We announced the same rule in a large number of cases decided under former Practice acts." (Citing numerous cases.)

In the case of *Shannon* v. *Nightingale*, 321 Ill. 168, the principle governing a situation, such as presents itself in the case at bar, was stated thus at pages 172-173:

> "*Wherever evidence must be introduced to maintain an issue of fact made by the pleadings controverted questions of fact are involved, which include not only evidentiary facts but ultimate facts*, even though there be no conflict in the testimony or the evidence may be agreed upon and embodied in a stipulation of facts." (Citing numerous cases.)
>
> . . . . . .
>
> "*The determination of the question of ultimate facts* whether or not Pratt was an employee of the plaintiff's in error *involves a conclusion derived from a consideration of all these and other evidentiary facts, in connection with the application of principles of law to a consideration of the evidence. The question thus becomes a mixed question of law and fact, as to which the verdict of the jury and the decision of the Appellate Court are conclusive and not subject to review.*" (Citing numerous cases.) (Italics supplied.)

And again in *Hadley* v. *Union Trust & Savings Bank*,

308 Ill. 175, at page 181, the Illinois Supreme Court reiterated that

> "The finding of the Appellate Court of a question of ultimate fact derived from a consideration of evidentiary facts, though requiring the application of principles of law to the consideration of the evidence, is a finding upon a mixed question of law and fact, which is final. (*Navratil* v. *Curtis Door and Sash Co.*, 290 Ill. 526.) We are prohibited by law from allowing any assignments of error calling in question the determination of such a question of fact by the Appellate Court."

In *Roemheld* v. *City of Chicago*, 231 Ill. 467, the Supreme Court of Illinois said, at pp. 469-470:

> "It is also urged that the finding in the Appellate Court as to the facts is a mere recital of conclusions or opinions. It is true that *the finding of an ultimate fact is a statement of a conclusion, but it is a conclusion of fact from the various subsidiary or evidentiary facts tending to prove such ultimate fact. To reach the conclusion may require the application of legal principles so as to make the question a mixed one of law and fact,* such as the question whether uncontradicted testimony establishes the fact of an appointment of an agent, or that a certain act was the proximate cause of an injury, or that there was a waiver of a legal right or an estoppel to assert it. (*Meyer* v. *Butterbrodt*, 146 Ill. 131; *Moerschbaecher* v. *Supreme Council Royal League*, 188 id. 9.) The Appellate Court concluded that what was done by the commissioner of public works *amounted to an approval*, in writing of the set of working drawings, and an order, in writing, to do the work as shown thereon, *and this was a question of fact.*" (Italics supplied.)

In *McGovney* v. *Melrose Park*, 241 Ill. 142, the Illinois Supreme Court, at page 144, used the following language:

> "It is insisted by appellant that the finding of facts by the Appellate Court includes legal conclusions, and that therefore this court is not bound by such finding,

citing *Hogan* v. *Chicago and Alton Railroad Co.*, 202 Ill. 206, and *Martin* v. *Martin*, 202 id. 382. It may be true that the finding of ultimate facts by the Appellate Court includes conclusions, and that to reach these conclusions required the application of legal principles by that court; *but the most that can be said in favor of appellant's contention is*, that the questions whether he was appoined as village attorney, *whether all the services were within the sphere of his duties as village attorney* and whether the ordinance in question was in force *were mixed questions of law and fact, and the findings of the Appellate Court on questions of that character are conclusive on this court and may not be reviewed here.* (*Moerschbaecher* v. *Royal League*, 188 Ill. 9; *Roemheld* v. *City of Chicago*, 231 id. 467.) This being so, it is unnecessary for us to consider or decide the other questions raised in the briefs."

A reviewing court is not concerned with the reasons assigned by the lower court for its judgment.

In the recent case of *Merlo* v. *Public Service Co.*, 381 Ill. 300, at 321, the Illinois Supreme Court succinctly announced the limits of its inquiry as follows:

"The inquiry of this court in cases appealed from the Appellate Court can only be whether there was error committed in rendering the *judgment* complained of. In actions at law this inquiry is confined to errors of law. While this court will examine the opinion of the Appellate Court to determine whether that court predicated its judgments solely on an erroneous conception of law, *what that court may assign as reasons for its judgment is not a matter of concern here.* Our duty is to determine the correctness of the judgment reviewed." (Italics supplied.)

That principle was recognized by the Supreme Court of Illinois in the concluding words of its opinion in the instant case as follows:

"The Appellate Court may be in error in the reasons given for its judgment, but, under the facts as

found by the court, the employee came within the same exemption as loaders, dockmen and helpers.

For the reason aforesaid, the judgment of the Appellate Court is affirmed." (R. 52.)

The fact that a certificate of importance was granted does not have the effect of enlarging the scope of the inquiry which the Illinois Supreme Court is permitted to make. In *Stevenson* v. *Earling*, 290 Ill. 565, where the case was tried without a jury, the Appellate Court reversed, and granted a certificate of importance. In its opinion, at page 568, the Court said:

> "The finding of an ultimate fact is a conclusion of fact drawn from evidentiary facts, and the application of legal principles may be required to reach such conclusion, thereby making the question a mixed one of law and fact. Findings by the Appellate Court on mixed questions of law and fact are binding on this court." (Citing cases.)

The petitioner, in his summary of argument (Brief, p. 13) states that "a reviewing court's decision cannot be based on a guess or surmise". The Supreme Court of Illinois, in its opinion, refutes any such intimation, as appears from the following:

> "We have analyzed the cases as to the interpretation and construction to be given the Motor Carrier Act as to employees coming thereunder by reason of their employment affecting safety operations and are of the opinion that the true determinant is not whether an employee performs any duties which substantially affect the safety of operations, but whether the duties affecting the safety are substantial. This brings us to the question of the effect of the Appellate Court's decision.
>
> Plaintiff's contention is that the Appellate Court erred in disregarding the specific findings of the trial court that the major portion of plaintiff's duties did not affect safety of operation; that the findings of the court cannot be disregarded or disturbed unless against

the manifest weight of the evidence; that where the evidence is merely conflicting the Appellate tribunal should not substitute its judgment as to the credibility of witnesses for that of the jury or the trial court. Plaintiff, therefore, insists that this court reverse the judgment of the Appellate Court and affirm the findings and judgment of the trial court. We do not think the Appellate Court substituted its judgment, as to the credibility of witnesses, but only exercised its authority under section 89 of the Civil Practice Act, to make a final determination of the case different from that of the trial court. (Ill. Rev. Stat. 1943, chap. 110, par. [fol. 68] 213.) In nonjury cases, such as this, the Appellate Court may make findings of fact different from the findings of the trial court. * * * *Plaintiff's contention that this court should affirm the findings and judgment of the trial court in that respect is not tenable.*

Defendant contends the Appellate Court has exercised its statutory authority making final decision of the case and that the decision of the Appellate Court should therefore be affirmed. This presents the question as to whether or not the facts found by the Appellate Court sufficiently appear in the opinion or in the final judgment, or, from an examination of the two, to support the judgment as entered. *We think the question of fact to be properly determined in this case is whether or not a substantial part of plaintiff's work affects safety of operation of motor vehicles, and that this question of fact controls this case.* If it be determined from the evidentiary facts that plaintiff, in a substantial part of his work, was engaged in safety of operation of motor vehicles, or the cargo thereof, he would be exempted from the Fair Labor Standards Act, as a matter of law.

The Appellate Court found that the loaders in Appellant's gang were exempted from section 7 of the Fair Labor Standards Act and that appellant therefore came within the exemption because he planned and directed the loading affecting the safety of operation." (Emphasis supplied.) (R. 50, 51, 52.)

It is clearly apparent that the Supreme Court of Illinois was satisfied from a consideration of the opinion of the Illinois Appellate Court and its judgment, that petitioner's duties substantially affected the safety of operation of the respondent's motor vehicles in interstate commerce.

The soundness of the reasoning of the Supreme Court of Illinois has been recognized and approved by the Circuit Court of Appeals for the Second Circuit in *Walling* v. *Comet Carriers*, ~~115~~ 151 F. (2) 107.

III.

No Question of Due Process of Law Is Involved.

Petitioner has apparently abandoned his contention that the reversal of the trial court's judgment deprived him of due process of law. It was not until after the Supreme Court of Illinois had decided the case that he made that bald assertion in his petition for rehearing (R. 60-61). He neither mentions said contention in his Specifications of Errors nor in his argument (Rule 27(6)).

Such question, therefore, may not be raised here for the first time.

Hulbert v. *Chicago*, 202 U. S. 275.

Pennsylvania Railroad Co. v. *Ill. Brick Co.*, 297 U. S. 447, 462, 463.

IV.

No Important Question of Law Is Involved.

It is submitted that the record clearly e 'ablishes that petitioner, as a "working foreman", not only actually performed the duties of a loader, but with the additional responsible duties of supervising all of the loaders on the dock, the substantial and major part of his work directly affected the safety of operation of respondent's motor vehi-

cles; that the Illinois Supreme Court did not attempt to broaden the jurisdiction of the Interstate Commerce Commission, because "loaders" constitute one of the specifically designated class of motor carrier employees who are exempt from the provisions of the Fair Labor Standards Act; that merely because petitioner chose to designate himself as a "checker", he was not thereby excluded from the class of exempted employees.

The entire matter involved herein is one of fact.

This court has repeatedly announced that "the application of the Act depends upon the character of the employee's activities."

Overstreet v. *North Shore Corporation*, 318 U. S. 125, 132.

Kirschbaum v. *Walling*, 316 U. S. 517.

Conclusion.

It is respectfully submitted that the petitioner has not shown any valid reason to disturb the judgment of the Supreme Court of Illinois; that said Court has correctly decided the issues presented and that its judgment should be affirmed.

Respectfully submitted,

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APPENDIX.

The Fair Labor Standards Act of 1938, U. S. C. A., Title 29, provides as follows:

"SECTION 207. Maximum hours:

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

"SECTION 213. Exemptions:

(b) The provisions of Section 207 of this title shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49; or (2) any employee of any employer subject to the provisions of sections 1-27 of Title 49."

Part II, Interstate Commerce Act, U. S. C. A., Title 49, Sec. 304 (formerly cited as the Motor Carrier Act of 1935, U. S. C. A., Title 49, Sec. 204) provides as follows:

"SECTION 304: Powers and duties of commission.

(a) Powers and duties generally. It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle

as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

Chap. 110, Sec. 213, Smith-Hurd Illinois Statutes (Sec. 89 Civil Practice Act) provides:

"If any final determination of any cause or proceeding tried without a jury, except as to equitable issues, shall be made by the Appellate Court, as the result wholly or in part of the finding of the facts, concerning the matter in controversy, different from the finding of the court from which such cause or proceeding was brought by appeal, it shall be the duty of such Appellate Court to indicate in its opinion or in its final order, judgment or decree, the facts as found; and the statement of such facts by the Appellate Court shall be final and conclusive as to all matters of fact in controversy in such cause or proceeding. If the facts found by the Appellate Court sufficiently appear in the opinion or in the final order, judgment or decree, or from an examination of the two, no such final order, judgment or decree shall be reversed for failure to recite such facts. (1933, June 23, Laws 1933, p. 784, art. 8, Sec. 89.)"

Chap. 110, Sec. 216, Smith-Hurd Illinois Statutes (Sec. 92.(3) (b) of Illinois Civil Practice Act) provides:

"Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review in any civil case: Provided, that, except as to equitable issues, the Supreme Court shall reexamine cases brought to it by appeal from the Appellate Courts, as to questions of law only."